No. 13889.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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1. The Question Involved.

The Government concedes that the decision of the District Court herein is tantamount to a holding that the Military Personnel Claims Act is the exclusive remedy of military personnel and civilian employees of the Defense Department for all service connected property damage losses (Govt. Br. pp. 5, 15, footnote 8; pp. 19-20, 22). It is therefore apparent, as contended by appellants (Op. Br.

p. 9, footnote 11; pp. 47-48) that the issue here involved is of far reaching importance and goes far beyond the subrogation rights of insurers, since it directly affects the claim rights of the millions of military and civilian personnel of the Defense Department.

2. The Feres Case Is Not Here Controlling.

In appellants' opening brief (pp. 11-52) we set forth a detailed analysis of the legislative and administrative history and construction of the various pertinent claims statutes, including the Gunfire Act of 1912, the Small Tort Claims Act of 1922, the Military Claims Act of 1943, the Military Personnel Claims Act of 1945 (and its predecessors) and the Tort Claims Act. We pointed out that it appeared therefrom that neither the Military Personnel Claims Act of 1945 (nor its predecessors) were construed as being the exclusive remedy of service personnel for service connected property damage losses, but on the contrary, for many years it had uniformly been held that service personnel were not only entitled to make claim for such property damage losses under the Military Personnel Claims Act, but also had the right to make claim therefor under any of the claim statutes applicable to civilians generally, including the various statutes above referred to. This appeared from the statutes themselves, from uniform rulings of the Judge Advocates General of the Armed Forces approving payment of such claims under the various claims statutes, from Congressional approval of such rulings by the appropriation of funds for such payments and by the amending of such statutes from time to time and the enactment of new claim statutes (including the Tort Claims Acts of 1946 and 1948) without ever providing that the Military Personnel Claims Act was to be

the exclusive remedy of military personnel for such losses.[1]

In its brief, the Government completely ignores the foregoing.[2] It is submitted that in view of the importance of the question involved in this case, that the matters presented in appellants' brief deserve at least some evidence of consideration on the part of the Government. No doubt the Department of Justice is authorized to take any position it feels is proper in defending a lawsuit against the Government, but it does seem that when such position, if sustained, will have the effect of prejudicing the claim rights of millions of Government employees and of overruling long established administrative procedures, that consideration for the interests of such employees, if for no other reason, would require some discussion by the Government of these important issues.

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[1]The rule of Congressional acceptance and ratification of administrative interpretation, referred to in the Government's brief (Footnote 12, pp. 22-23), is particularly applicable and pertinent to the situation here existing.

[2]The Government gives a slight indication that it has read our discussion of the legislative and administrative history of the various statutes, JAG rulings, Regulations, etc., in Footnote 10, page 20, of its brief where, in connection with another point, the Government states that appellants have argued that the Army and Air Force have allowed military claimants to proceed either under the Military Personnel Claims Act or the Military Claims Act. This is obviously an inaccurate and incomplete statement of appellants' argument. Having so misstated appellants' argument, the Government says "the short answer to this argument is that the official Regulations promulgated by the Army and Air Force recognize the exclusive nature of the Military Personnel Claims Act remedy." While it must be conceded the Government's so-called answer is "short," it is neither accurate nor convincing. 32 C. F. R., Section 536.17, Army Regulations (App. Op. Br. p. 35), specifically provides that *service connected* property damage claims will "be considered *first*" under the Military Personnel Claims Act, but *"such claims* (referring to *service connected* property damage claims) found not to be payable" under the Military Personnel Claims Act *will then be processed* under the Tort Claims

The Government takes the position that the *Feres* case requires a holding that service connected property damage losses are compensable exclusively under the Military Personnel Claims Act. The *Feres* case involved a situation where 3 soldiers were injured while on active duty as a result of the alleged negligence of the Government, and the Supreme Court denied them the right to sue under the Tort Claims Act largely because no federal law, other than the compensation remedies available to soldiers, had ever recognized claims for service connected personal injuries, and because these compensation acts provided a system "of simple, certain and uniform compensation," and the benefits provided were adequate. In this situation, the Court concluded that these compensation benefits were intended by Congress to be the exclusive remedy for service connected personal injuries. The Government

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Act and Military Claims Act. And 32 C. F. R., Section 836.103, Air Force Regulations, provides as follows:

> "Claims within the scope of secs. 836.90 to 836.108 (Military Personnel Claims Act) which are also within the scope of regulations covering non-negligence claims (secs. 836.30 to 836.44, Military Claims Act of 1943), tort claims (secs. 836.10 to 836.25, Tort Claims Act) * * * will be *initially investigated and processed* under the provisions of secs. 836.90 to 836.108 which is preemptive of other claims regulations. Such claims will be forwarded through channels to the Judge Advocate General * * *. The determination of whether any such claims should be settled under other regulations will be made by the approving authority."

In other words, the Regulations provide that solely as a matter of administrative handling, service connected property damage claims are to be *initially* processed under the Military Personnel Claims Act, but those excluded from coverage or not fully covered under the regulations under said Act may then be paid under the other claim acts. And the Judge Advocates General have so ruled (Op. Br. pp. 24-26, 30-34).

The Government's mention (Br. p. 9) of House Report 237 wherein the proposed Military Personnel Claims Act of 1945 was referred to as a "single, clear, definite, and workable statute" is fully answered at pages 21-25 of Appellants' Opening Brief, where this Report is analyzed in detail.

also cites subsequent Supreme Court and Court of Appeals decisions reaching similar conclusions as to personal injury claims of other government employees whose injuries are covered under the Federal Employees Compensation Act. Says the Government (pp. 10-11), these cases are illustrative of the general rule that where Congress "through a series of enactments has legislated with respect to a particular subject matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application * * * are * * * inapplicable." From this, the Government jumps to the conclusion that the Military Personnel Claims Act is the exclusive remedy for service connected property damage losses.

As pointed out in appellants' opening brief (pp. 41-42, 48-50), the *ratio decidendi* of these cases is not applicable to the problem here involved. For many years, service connected property damage claims have *not* been compensable exclusively under the Military Personnel Claims Act; on the contrary they have been cognizable also under the various claim statutes applicable to civilians generally. And, as we have shown when Congress enacted the Military Personnel Claims Act of 1945, *it specifically provided* that such act was not to be the exclusive remedy of service personnel for such losses, but that they were also to have the right to claim under the Military Claims Act of 1943, which latter act, in turn, was superseded by the Tort Claims Act of 1946 as to negligence claims. As was specifically noted by the Supreme Court in the *Johansen* case—

> "As the government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions *without specific legislation to that effect.*"

Since Congress has provided that the Military Personnel Claims Act was not to be the exclusive remedy for service connected property damage losses, the *Feres* and related cases are not applicable.

As we have pointed out, the reason for different congressional treatment of service connected personal injury and property damage claims is apparent. The compensation remedies available to military and other government employees are certain, uniform and adequate. *Every soldier* who is injured on active duty, unless due to his own misconduct or intoxication, *is absolutely entitled* to receive a definite amount of compensation (see Op. Br. p. 49).[3] The enforcement of these rights is provided for in great detail by the federal laws, including the right to various administrative hearings and appeals. And it has been held that there is a right of court review where such benefits are denied contrary to law (*Dismuke v. United States,* 297 U. S. 167).

On the other hand, the benefits provided by the Military Personnel Claims Act and the Regulations promulgated thereunder are not remotely comparable to such personal injury compensation benefits. That act confers no *rights* but is purely an act of grace with power in the officer passing on the claim to deny or reduce any claim in whole

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[3]In addition to the statute there cited see 38 U. S. C. A., Section 151, which provides:

> "*Every person* (soldier) * * * who has been * * * disabled * * * *shall* * * * *be entitled to receive* * * * *such pension* * * *."

And similarly the Federal Employees Compensation Act (31 U. S. C. A., Sec. 751), provides:

> "The United States *shall pay compensation as hereinafter specified* for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *."

or in part and there is no right of appeal or review, administrative or court, from such action.

United States v. Huff (C. A. 5), 165 F. 2d 720.

And as we have noted (Op. Br. p. 21), the act and regulations contain numerous exclusions and restrictions as to type and amount of claims that may be paid.

While it is true that Congress *could* leave service personnel with such restricted rights (or with no claim rights at all) if it so desired, there is no reason, under the circumstances here existing, to restrict such rights, where Congress has indicated a contrary intent. The *Feres* case and the other cases relied upon by the Government were at pains to point out the adequacy and fairness of the awards recoverable under the compensation acts (Op. Br. pp. 48-49). For example, in *Firth v. U. S.* (207 F. 2d 665), this Court specifically noted that the benefits recoverable under the compensation act would be greater than the amount awarded by the judgment in the District Court, and it remanded the case without prejudice to the claimant's right to claim such compensation. The Government would here have this Court distort the ruling in the *Feres* case, with the result that the claim rights of military personnel would be greatly restricted. It is submitted that no reason exists for such a harsh result; especially since it is contrary to the intent of Congress.

3. The Losses Were Not Service Connected.

The Government here urges a point not urged by it in the District Court. The Government argues that since the Military Personnel Claims Act provides that "any *such settlement* * * * shall be final and conclusive for all purposes," and since the air force personnel filed claims

for certain uninsured property losses which were paid, such *"determination"* by the Air Force that the damage was incident to service is determinative of that issue in this action.

No pertinent authority is cited in support of this argument. The statute says only that the *settlement* shall be final. It is submitted that the statute means only what it says, viz., that the soldier can make no further claim for the articles covered by the claim; nor can the Government refuse to pay the amount allowed.[4] The statute does not say that the incidental *determination* by the Air Force that the claim was service connected shall be binding in an action brought under the Tort Claims Act upon a separate claim that was never presented to the Air Force. The Stipulation of Facts recites that when the soldiers filed their uninsured claims they had already been paid by the insurers for the trailer losses, and the claims they filed with the Air Force specifically set this forth (see Op. Br. p. 5). Since the insurers owned the claims for the trailer damage at that time and since the insurers took no part in presenting any claim to the Air Force, such determination upon the soldiers uninsured claims could not bind the insurers (see Op. Br. pp. 65-66).

The Government seeks to distinguish *Lund v. United States,* 104 Fed. Supp. 756, upon the ground that there had been no prior administrative determination in that case that the loss was service connected; therefore, the District Court was free to make such determination itself. This could not be a sound analysis of that decision. In any

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[4]For example, *United States v. Babcock,* 250 U. S. 328 (Govt. Br. p. 16), merely holds that when a claim has been allowed by military authority under the Military Personnel Claims Act, the Government may not obtain a court review of such allowance.

particular case, the loss is either service connected or it is not. If the Government's position is correct, exclusive jurisdiction of service-connected property damage losses is in the Air Force, and the soldier could not confer jurisdiction on the District Court to hear the case, merely by by-passing the Air Force. Factually, the *Lund* case and the instant losses are similar, and if the loss in the *Lund* case was not service connected, neither are the instant losses. To be consistent, the Government would have to disagree with the conclusion of the District Court in the *Lund* case, but this it does not do. It is submitted that the *Lund* case is well reasoned and the conclusion that the loss was not service-connected is sound and here pertinent.

The Government argues (pp. 17-18) that the issue of whether the loss was service-connected should be determined by reference to rules applicable to workmen's compensation claims; *e. g.,* if the condition of employment creates a "zone of special danger" out of which the injury arose, the loss should be held to be service connected. Again the Government raises a point that was not suggested by it in the District Court. In any event, the rules applicable to workmen's compensation claims are not controlling or of assistance in determining whether a property damage claim of a soldier is service-connected. There are a number of federal cases decided under the Tort Claims Act and a large body of Judge Advocates General rulings which consider and determine whether various personal injury and property damage claims are service-connected under the Tort Claims Act and other military claims statutes. Why the Government asks this Court to ignore this large body of court and administrative law on the very point in issue and look to workmen's compensation cases is not clear. These cases and rulings are set forth in

Appellants' Opening Brief (pp. 53-62). The Government completely ignores the cases and dismisses the Judge Advocates General rulings with the brief comment that they "turn on the facts peculiar to them" (p. 16, footnote 9, Govt. Br.). An examination of these cases and rulings shows that they are pertinent in deciding whether the instant losses were service connected. These cases and rulings announce two situations where losses are uniformly held not to be service-connected (1) where the loss occurs when the soldier is off duty,[5] and (2) where the soldier is making use, for his own convenience, of a government facility which he is not ordered to use. Both of these situations existed in the case at bar.

That the workmen's compensation "zone of special danger" rule is not applicable here also appears from the case of *Herring v. United States,* 98 Fed. Supp. 69 (App. Op. Br. p. 55), where the court noted that under the *Feres* and *Brooks* cases, "the source and circumstances of the injury are relatively unimportant," the determining factor being *the duty status* of the soldier. Likewise, the *Brown, Samson* and *Lund* cases and the various Judge Advocates General rulings (App. Op. Br. pp. 56-62) make clear that the "zone of special danger" is not the test to be applied here, since they dealt with losses occurring in the "zone of special danger," and yet were held not to be service connected.

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[5]In a very recent decision, it was reaffirmed that under the rule of the *Feres* case the injury cannot be said to "arise out of or in the course of activity incident to service" if it occurs when the soldier is *off duty.* See *Brown v. United States* (C. A. 2, Jan. 5, 1954), opinion by Frank, Circuit Judge, referred to in 22 United States Law Week 2320. Incidentally, in this opinion the court refused to follow *O'Neil v. United States* (C. A., D. C.), 202 F. 2d 366, cited in the Government's Brief, page 14.

In connection with the service-connected issue, mention should also be made of the reference by the Government in its Statement of Facts (Br. p. 3) to the affidavit filed by it in support of its motion to dismiss wherein it was stated that the personnel "were on active duty, and duly assigned to military functions, at and about the time of the said crash." This motion was submitted to the District Court on a Stipulation of Facts [Tr. pp. 13-22] and said affidavit formed no part thereof, is contrary to the Stipulation, and should be disregarded on this appeal. The portion of the Stipulation here pertinent is set forth in subparagraph 14 and footnote 4, page 4 of Appellants' Opening Brief.

4. The Rules Applicable to Subrogation.

It may be conceded that an insurer may not subrogate if the insured had no right to sue the tortfeasor at the time the insurer paid the loss. As pointed out in our Opening Brief, it is immaterial that the Military Personnel Claims Act does not provide for the allowance of subrogated claims since this suit is brought under the Tort Claims Act which does recognize such claims (Op. Br. pp. 44, 48).

The Government argues (p. 23) that the provision in the Military Personnel Claims Act excluding subrogation claims bars this suit under the Tort Claims Act, citing cases holding that provisions in bills of lading giving carriers the benefit of a shipper's insurance preclude an insurer from subrogating against the carrier. These cases and this argument are not here relevant for the following reasons:

(1) This action is cognizable and brought under the Tort Claims Act; therefore the provisions of the Military Personnel Claims Act are irrelevant.

(2) The bill of lading cases recognize that if the losses are paid under loan receipts or if the policy has a provision that the insurance shall not inure to the benefit of a carrier or bailee, the insurer may then subrogate, irrespective of the provisions of the bill of lading. To this effect, see

Luckenbach v. McCahan Sugar Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170;

Mode O'Day Corp. v. Ringsby Truck Lines, Inc., 100 Cal. App. 2d 748, 224 P. 2d 368.

The Government did not urge this point in the District Court; hence the Stipulation of Facts did not cover the question of whether the losses were paid under loan receipts or whether the policies contain a provision such as referred to above. Under these circumstances, the Government may not raise such a point for the first time in this Court.

(3) In any event the bill of lading cases do not deal with an analogous problem and are not here pertinent.

Respectfully submitted,

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